MISCELLANY.

Effect of Restrictive Covenants on Marketable Titles.—While a vendor may specifically enforce a contract for the sale of land to recover the purchase price; in order to do so he must offer the vendee a "marketable" title, one not subject to any defect,[1] incumbrance[2] or restriction.[3] This requirement does not necessarily depend upon the purchaser's having stipulated in the contract for a title "free of incumbrances". Such a condition in the agreement is implied unless it appears distinctly to the contrary, and unless fulfilled the purchaser is relieved from his bargain.[4] But all defects in the title do not constitute defenses to an action for specific performance. It is frequently said that a title that is reasonably free from doubt cannot be objected to by the vendee.[5] A mere possibility of an adverse claim is not a defect.[6] The general test applied is not whether the purchaser will ever be incommoded by the restriction on the land,[7] but whether the title offered is marketable.[8] Inasmuch as a marketable title is defined as one which can be forced on an unwilling purchaser,[9] this test must

[1] Townshend *v.* Goodfellow (1889) 40 Minn. 312, 41 N. W. 1056; Zane *v.* Weintz (1903) 65 N. J. Eq. 214, 55 Atl. 641; Martin *v.* Hamlin (1900) 176 Mass. 180, 57 N. E. 381.

[2] Giles *v.* Union Land Co. (Tex. 1917) 196 S. W. 312.

[3] Wetmore *v.* Bruce (1890) 118 N. Y. 319, 23 N. E. 303; Remsen *v.* Wingert (1906) 112 App. Div. 234, 98 N. Y. Supp. 388 (easement); Raynor *v.* Lyon (N. Y. 1887) 46 Hun. 227.

[4] Bowen *v.* Vickers (1839) 2 N. J. Eq. 520; see Moore *v.* Williams (1889) 115 N. Y. 586, 592, 22 N. E. 233. "But, aside from the language used in the contract it is familiar law that an agreement to make a good title is always implied in executory contracts for the sale of land, and that a purchaser is never bound to accept a defective title, unless he expressly stipulates to take such title, knowing its defects."

[5] Conley *v.* Finn (1898) 171 Mass. 70, 72, 50 N. E. 460. "'When questions as to the validity of a title are settled beyond a reasonable doubt, although there may be still the possibility of a defect, such mere possibility will not exempt one from his liability to complete the purchase he has made.'"

[6] Bardes *v.* Herman (1911) 114 App. Div. 772, 129 N. Y. Supp. 723; Post *v.* Bernheimer (1883) 31 Hun. 247.

[7] Brooklyn Park Comm. *v.* Armstrong (1871) 45 N. Y. 234, 248. "When it is ascertained that there is an existing defect in the title, the purchaser will not be compelled to perform on the allegation that it is doubtful whether the defect will ever incommode him."

[8] Dyker Meadow etc. Co. *v.* Cook (1899) 159 N. Y. 6, 15, 53 N. E. 690. "To entitle a vendor to specific performance, of a contract for the purchase and sale of real estate, he must be able to tender a marketable title."

[9] Pryke *v.* Waddingham (1852) 10 Hare 1, 8. "* * * that the rule rests upon this, that every purchaser is entitled to require a marketable title, by which I understand to be meant a title which, so far as its antecedents are concerned, may at all times and under all circumstances, be forced upon an unwilling purchaser."

be further expanded to be of any use. An outstanding mortgage or lien where the court can decree the discharge of the incumbrance out of the purchase money, is held to be no bar to the vendor's suit.[10] And it would seem that where the adverse claimant to a title is before the court his claim could be definitely settled so as to render the title no longer uncertain.[11] The more difficult question arises where the court cannot remove the alleged defect, and must decide whether the adverse claim, incumbrance or restriction is substantial enough to render the title unmarketable. A title may be doubtful where the defect is based (1) on an uncertain question of law, or (2) on the existence of certain unknown facts, especially where these facts can be proved only by parol or equally uncertain evidence.[12] Where there was a doubtful question of law involved, the early English practice was for the court to decide for or against the validity of the title, and to rule accordingly on the vendor's suit, although such a decision would not be *res judicata,* if the titulary defect were contested.[13] This is not the rule today either in England [14] or this country.[15] It is commonly said that a purchaser will not be compelled to buy a lawsuit.[16] So where the law is doubtful the court will not compel the vendee to complete his contract, as the court's opinion of the law might not be binding in a later suit. But if the specific defect in the title the vendor offers, has been definitely settled by precedents, so that no other court could reasonably decide in favor of the outstanding claim, the title is held to be marketable.[17]

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[10] Guild *v.* Atchison, T. & S. F. R. R. (1896) 57 Kan. 70, 45 Pac. 82; Blanton *v.* Kentucky Distilleries etc. Co. (C. C. 1902) 120 Fed. 318, 340, *aff'd.* (C. C. A. 1906) 149 Fed. 31; Frain *v.* Klein (1897) 18 App. Div. 64, 45 N. Y. Supp. 394 (assessment lien).

[11] Chesman *v.* Cummings (1886) 142 Mass. 65, 7 N. E. 13.

[12] Fahy *v.* Cavanagh (1899) 59 N. J. Eq. 278, 44 Atl. 154.

[13] See note in Shapland *v.* Smith (1780) 1 Brown C. C. *75, 76.

[14] Palmer *v.* Locke (881) 18 Ch. D. 381, 388; Pryke *v.* Waddingham, *supra,* footnote 9; Stapylton *v.* Scott (1809) 16 Ves. *272.

[15] Zane *v.* Weintz, *supra,* footnote 1; Richards *v.* Knight (1902) 64 N. J. Eq. 196, 53 Atl. 452; Dyker Meadow etc. Co. *v.* Cook, *supra,* footnote 8.

[16] Boylon *v.* Wilson (Ala. 1918) 79 So. 364, 366. "One who has contracted for a 'good title', will not be required to take anything but a 'good title', and the court will not compel him to buy a lawsuit."

[17] Reformed Protestant Dutch Church *v.* Madison Ave. Bldg. Co. (1915) 214 N. Y. 268, 108 N. E. 444. In this case a contract for the conveyance of property on Madison Avenue was specifically enforced. The property was subject to a general restriction that no buildings should be erected on the block other than dwelling houses of at least two stories in height. The proposed purchaser desired the premises as a site for a large apartment house, and the contract provided that it should not be enforceable, if the admitted, restrictions would prevent the erection of such a building. It was held that according to the law of New York, the term dwelling house was broad enough to

In a recent suit by a vendor to specifically enforce a contract for conveyance of land on Fifth Avenue near Thirty-ninth Street, Bull *v.* Burton (1919) 227 N. Y. 101, 124 N. E. 111, it was held by a majority of the court that restrictive covenants, imposed on the land by a predecessor in title, against the erection on the land of any slaughter house, smith shop, forge, etc., or other noxious business, or the keeping of any stable thereon, were restrictions such as to render the title defective and unmarketable. While outworn restrictions on residential property, where the character of the neighborhood has changed into a business district, so as to render the restrictions of little benefit to the adjacent dominant estates and of considerable hardship to the owner of such property, may not be enforceable,[18] in this case the covenants were something more than mere restrictions to preserve a residential section. Presumably a first class business house on Fifth Avenue might yet object to the erection of a stable next door. At least the question of their enforceability would seem to be sufficiently doubtful to prevent such a title being marketable.

The dissenting opinion considered it absurd that these restrictions should be considered incumbrances, that land worth $19,700 a front foot should ever be used for a slaughter house, smith shop, etc., and that such a title was completely marketable. And this brings up the question whether the rule of marketability should be extended to cases where the incumbrance is a restriction which is unlikely ever to be a burden on the owner's actual use of the property. It is true that where a defect in a title rests on a mere possibility of an outside claim existing or on the remote contingency of a future event, the title is not unmarketable.[19] But if a reasonable doubt as to such a defect exists, the purchaser will not be compelled to receive the land.[20] In Bull *v.* Burton, *supra,* the defect asserted by the vendee was in effect, that if the contingency arose that the owner of the land wished to maintain a slaughter house, smith shop, etc., his rights of ownership would be restricted. If, despite the great value of the property, the

include and permit an apartment house, and that any suit brought to interfere with the purchaser's use of the property for an apartment house would be determined by the rule of *stare decisis* and the restriction therefore would not prevent the vendor from enforcing specific performance of the contract in question.

[18] Trustees of Columbia College *v.* Thacher (1882) 87 N. Y. 311; 14 Columbia Law Rev. 438.

[19] Rife *v.* Lybarger (1892) 49 Oh. St. 422, 31 N. E. 768; Camberling *v.* Purton (1891) 125 N. Y. 610, 26 N. E. 907; Bardes *v.* Herman, *supra,* footnote 6; Post *v.* Bernheimer, *supra,* footnote 6. But this contingency must be very remote.

[20] Hess *v.* Bowen (C. C. A. 1917) 241 Fed. 659; Doutney *v.* Lambie (1911) 78 N. J. Eq. 277, 78 Atl. 746; Remsen *v.* Wingert, *supra,* footnote 3; Baker *v.* Baker (1918) 284 Ill. 537, 120 N. E. 525 (*Semble*); Dole *v.* Shaw (1918) 282 Ill. 642, 118 N. E. 1044.

owner should actually wish to carry on such business the court would have had to find the title unmarketable. It might find conceivably that the purchaser, despite his assertions to the contrary, could not possibly desire then, nor at any future time, to erect such building.[21] But this would be extending the remote contingency doctrine beyond its present application and would not seem to be warranted by the facts in this case.[22]

Columbia Law Review.

Legislative Admission to the Bar.—Adkins, Meservie, and Hefner applied to the Supreme Court of Appeals of West Virginia for licenses to practice law. They presented no certificates from the state board of examiners to show that they had passed the required examination, according to section 1, c. 119, of the Code, and an order of the court made pursuant thereto prescribing a standard preliminary education, and also prescribing the length of time they should devote to the study of law. Instead of such certificates they presented joint resolutions of the Legislature reciting that the applicants possess all the qualifications now required of candidates for license, except those relating to educational preparation and length of time they have studied law. The resolutions further recite that, because of the age of the applicants, it is impracticable for them to take the bar examination, but that they possess the qualification of good lawyers, in consideration whereof the Supreme Court of Appeals is "requested" to issue license to Hefner and "required" to issue licenses to Adkins and Meservie.

The Supreme Court of Appeals, in an opinion by Judge Williams (In re Adkins et al., 98 S. E. 888), refuses to grant licenses, and holds

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[21] In some classes of cases, notably party wall agreements, restrictions on land which are offset by reciprocal benefits are held by the courts to be well recognized benefits to the land rather than burdens, and hence not incumberances on the title, Hendricks *v.* Stark (1867) 37 N. Y. 106, the court in such cases apparently believing that the likelihood of anyone objecting to such arrangements is too remote a possibility to render the land unmarketable. In Riggs *v.* Parsell (1876) 66 N. Y. 193, this doctrine was applied to property on a block where there was a general restriction requirng that a courtyard be left in front of each house. The case was later reversed when it was alleged that the restrictions did depreciate the market value of the land. Riggs *v.* Pursell (1878) 74 N. Y. 370. The purchase was made at a judicial foreclosure sale and the original case was later distinguished on that ground. See Wetmore *v.* Bruce, *supra,* footnote 3, at p. 323; Scudder *v.* Watt (1904) 98 App. Div. 228, 231, 90 N. Y. Supp. 605. It is difficult, however, to see any distinction as regards this point between a private and a judicial sale. It is surprising that the ccurt should render its own proceedings of greater hazard to the purchaser than a private sale.

[22] Cf. Dethoff *v.* Voit (1916) 172 App. Div. 201, 158 N. Y. Supp. 522.

that if such a resolution could be construed as a statute it would be invalid, among other reasons, as in violation of section 39, art. 6, of the Constitution, which prohibits the enactment of special laws where a general law would be proper, inasmuch as a general law covering this subject was already in existence.

Does Seduction Reduce?—Mr. G. B. Johnson, Attorney at Law of Honaker, Va. sends us the following copy of a warrant issued by a local Justice of the Peace charging the offense of seduction in the following words:

"That———did in said County on the——day of April, 1920, did have inter core and reduce one————by prois her to marry her and has refused to marry her agist degetury of the commonwealth of Virginia."

Good Name and Reputation.—The sole question before the Supreme Court of Ohio in Kintz v. Harriger, 124 N. E. 168, was whether or not perjured testimony before a grand jury was privileged, or whether it could be the basis of an action in malicious prosecution. The trial court held that it was not privileged, while the Court of Appeals held that it was. The Supreme Court, in a well-considered opinion by Judge Wanamaker, ranged itself upon the negative side of the controversy. The value that has always been placed upon good name and reputation is the theme of the following extract from the opinion:

"Before we ever had an English Magna Charta, or an American Bill of Rights in the form of a Constitution, federal or state, one of the most sacred rights of the citizen was the right to a good name and reputation, and to be protected in the enjoyment of that good name and reputation. Our constitutional fathers must have so regarded it or they would not have specially designated it in the organic law of our state.

"Solomon has aptly spoken:

"'A good name is rather to be chosen than great riches, and loving favor rather than silver and gold.'

"Shakespeare fittingly joined Solomon in his appreciation when he said:

> "'Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls.
> Who steals my purse steals trash; 'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him,
> And makes me poor indeed.'

"The great ambition of the great Lincoln, in his own words, was

to be 'truly esteemed of my fellow men by rendering myself worthy of their esteem.'

"This primary and precious right, solemnly proclaimed in Holy Writ, in the lives and literature of our own people, in our Constitutions and Bills of Rights, is too sacred a thing to be denied or destroyed by a mere 'Thus saith the court.'"

Naturalization of Hindus.—Mohan Singh, a high caste Hindu, applied for citizenship. His application was resisted by the government upon the ground that a Hindu does not come within the terms of Revised Statutes, § 2169 (Comp. St. § 4358), providing that the naturalization law shall apply to aliens being free white persons, and to aliens of African nativity, and to persons of African descent.

Judge Bledsoe, in the United States District Court for the Southern District of California, in construing the phrase "free white persons," says in granting the application for citizenship in Re Mohan Singh, 257 Fed. 209:

"Modern ethnologists use the terms 'white' and 'Caucasian' synonymously and interchangeably. Seemingly the preponderance of respectable opinion includes the Hindus of India as members of the Aryan branch or stock of the so-called Caucasian or white race. I have been cited to no anthropological authorities which includes the Hindus in any of the other races of mankind. They belong to the Aryan stock, and therefore to the Caucasian or white race, because of certain physical and other peculiarities possessed by them and which indubitably mark their descent. 'Caucasians' are 'white,' whether they live under the tropic sun, and therefore have a very dark skin, or abide in northern climes, and possess a light one. The possession of a 'common racial stamp,' is the basis of classifications.

"My conclusion is that, in the absence of any more definite expression by Congress, which is the body possessing the power to determine who may lawfully apply for naturalization, any members of the white or Caucasian race, possessing the proper qualifications in every other respect, are entitled to admission under the general wording of the statute respecting 'all free white persons.' In the absence of an authoritative declaration or requirement to that effect, it would seem a travesty on justice that a refined and enlightened high caste Hindu should be denied admission on the ground that his skin is dark, and therefore he is not a 'white person,' and at the same time a Hottentot should be admitted merely because he is 'of African nativity.' The same observation might apply with respect to equally enlightened members of other races who are now denied admission on the ground that they fall without the designation white or Caucasian."

Better the Guilty Escape than the Innocent Be Punished.—In Mixon *v.* State, 123 Ga. 581, 51 S. E. 580, the court said: "The court was requested to give the following charge: 'It is a well-established maxim of law that it is better to let one hundred guilty persons go unpunished than to punish one innocent person.' The refusal to do so was assigned as error. The request contains an abstract statement slightly modified from the usual expression that 'It is better that ninety-nine guilty men should escape than that one innocent person should suffer.' See Boon *v.* State, 1 Ga. 621. Whether or not this is a sound maxim in morals or sociology, it is not a rule of law suitable to be given in charge by a presiding judge to a jury. We have it on tradition that in the early history of the state a request of this character was made, and the judge of the trial court gave it in charge, but added that in his opinion the ninety-nine guilty men had already escaped."

IN VACATION.

Alimony Defined.—"What is alimony, ma?"

"Alimony, my child, is something that is considered by many women as an improvement on a husband."—*Boston Transcript.*

When Insanity Begins.—A new York lawyer tells of an old woman in that town who was present at the making of her husband's last will and testament.

"Now," said the lawyer engaged to draw up the instrument, "state just exactly what is owing you."

"Henry Wharton owes me $500," said the old man in the bed, "and," he added, with a racking cough, "Wallace McIntyre owes me $200."

"Good!" exclaimed the wife. "Rational to the last!"

"Richard Smith owes me $90," continued the sick man.

"Very rational," said the wife.

"To Patrick Casey I owe $900—" began the sick man.

"Ah," interrupted the wife. "Hear him rave! Hear him rave!"

Run Down.—Judge: Have you run down the authorities cited by your opponent?

Young Lawyer: Your honor, my opponent, commenting on his authorities, stated that they were "on all fours" with the case at bar. I ran them down, and now they haven't a leg to stand on.

Some Difference.—Lawyer—What was he arrested for?

Mike—They told me at the station that he took too much.

Lawyer—Too much or too many?

Mike—What is the difference?

Lawyer—Intoxication or bigamy.